



EXHIBIT 2
DATE 2-10-2009
HB HB 406

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Testimony of Montana Association of REALTORS® (MAR)

Glenn Oppel, Government Affairs Director

House Local Government Committee, Feb. 10, 2009, 3:00 p.m., Rm 172

House Bill 406 – Revise county interim zoning

Sponsor: Rep. Michele Reinhart

MAR Position: Oppose

Whenever a citizens' property or liberty interest is implicated, his or her fundamental right to due process is triggered. Such is the case with House Bill 406. It is a zoning bill so it implicates citizens' property rights. In the case of HB 406, however, citizens' due process rights are not protected at all. In fact, there are effectively no due process protections in HB 406 and as such, it is unconstitutional.

If HB 406 bill becomes law, boards of county commissioners will be able to zone private property for up to two years as long as they hold the hearing on the zoning and notice it up to seven days prior to the hearing. There is no emergency requirement and no requirement as to the contents of the notice and whether the substance of the zoning resolution will be included in the notice. The county is not required to make any findings whatsoever to adopt the resolution. A board of county commissioners could decide on one day to zone the entire county one house per 40 acres for two years. It could notice the hearing, and after seven days, the entire county would remain undeveloped for two years.

Section by Section Analysis

Amendments in Section 1 abolish the emergency requirement for interim zoning. This is problematic because it permits a drastic and invasive exercise of government power based on no exigent circumstances.

Amendments in Section 2 are unconstitutional since the proposed process only affords affected landowners seven-day publication notice prior to a hearing to adopt (not merely to consider) the zoning regulations. Additionally, there is no requirement that the notice set forth the substance of the zoning regulations. This is another critical omission. As such, on their face, these changes violate the Due Process clause of the 14th Amendment – if applied, this law would violate the Equal Protection clause as well and also the 5th Amendment.

How HB 406 Would Change Montana Zoning Law

The strong due process protections in current zoning law should be contrasted with the evisceration of due process protections in House Bill 406.

Title 76, Chapter 2, Part 2 of the MCA, which provides general zoning authority to Montana counties, contains specific procedures that must be followed in order to adopt a zoning regulation. The three due process requirements contained in Part 205 include: 1) notice in a newspaper of general circulation; 2) the scheduling of a public hearing; and 3) the ability of directly affected property owners to protest and nullify the zoning. The due process protections

contained in Montana zoning law serve as a fundamental check on arbitrary government action and are necessary to pass constitutional muster.

MCA 76-2-206 provides counties with additional authority to enact temporary zoning regulations to address an emergency. Under current law, the interim zoning regulation must be integrally linked to the emergency and can only be instituted for one year, with the option of extending for an additional year. As it stands, however, there is debate over whether interim zoning proposals must comply with the due process protections outlined in Part 205 – i.e. notice, public hearing, and protest. District Court Judge Jeffrey Sherlock, in *Fasbender v. Lewis & Clark County Board of Commissioners*, ruled that property owners do not have the right to protest an interim zoning ordinance. This case is being appealed to the Montana Supreme Court.

The debate over whether interim zoning must comply with the due process protections in Part 205 is important to understanding the ramifications of HB 406. If interim zoning is not subject to the due process protections of Part 205, then the amendments proposed in HB 406 – in particular the amendments that eliminate the “emergency” requirement – will provide counties with unchecked authority to zone any and all parcels within its jurisdiction with little or no guidelines and procedures. In fact, HB 406 would provide an option by which counties could utilize their new authority in Section 206 to circumvent the guidelines and due process protections required in Sections 201 through 205 to enact standard zoning regulations. The only comfort that property owners are afforded is that the county cannot extend the regulations past two years.

On behalf of fundamental property rights, MAR recommends a “do not pass” on HB 406.

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